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REPORT

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Disability Issues in Arbitration

by Stephen B. Rubin

Congress enacted the Americans with Disabilities Act of 1990 (ADA) for the express purpose of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . ."[1] Title I of the ADA addresses discrimination against individuals with disabilities in the employment setting.[2] Generally, the ADA provides that a covered employer may not discriminate against a qualified individual with a disability because of the disability with respect to any employment decision.[3] An individual is considered a "qualified individual with a disability" if she can perform, with or without a reasonable accommodation, the essential functions of the particular job in question.[4] A "reasonable accommodation" is a measure that enables an individual with a disability to perform a task that she would not be able to do otherwise. Reasonable accommodations can range from modification of a work schedule to construction of a wheelchair accessible workstation. The ADA requires reasonable accommodation as long as making the accommodation does not create an "undue hardship" on the employer. The ADA defines undue hardship as anything "requiring significant difficulty or expense."[5] Congress vested the Equal Employment Opportunity Commission with authority to enforce the ADA.[6]

The ADA has provided relief to individuals who have turned to the EEOC and federal courts for help. In addition, state laws supplement the ADA and, in some cases, provide broader employee protection.[7] The vocabulary and basic framework of the disability discrimination laws have found their ways into employee handbooks, personnel policies and collective bargaining agreements.

This article discusses how arbitrators treat disability issues by examining a representative sample of cases reported in the past five to six years, more or less following the effective date of the ADA.[8] From this sample, I have endeavored to extract some guiding principles and cautionary notes.[9] The reader should also be aware that most of the awards issued by arbitrators are not reported, due either to the lack of consent of the parties or to the standards for publication of BNA and CCH.

Adverse Actions

Most of the reported cases deal with adverse actions. These include discharge, reduction in pay grade, involuntary leave or other actions. In most of these cases, the precise physical condition of the employee is irrelevant to the employer taking the action. The employer knows generally that the employee cannot perform the full range of his normal duties. The employer is also generally aware of the employee's limitations and abilities.

An attempt to discharge a disabled employee is fraught with dangers for an employer, not only under the ADA, but in arbitration as well. Most of the earlier awards studied here, decided in 1992 and 1993, and many of the later ones, dealt with discharges allegedly for "cause" or "just cause." Sometimes the parties even stipulated that the issue was whether there was just cause.[10]

When so phrased, the issue presents a comfortable set of considerations for an arbitrator, but it may not suit the situation well. Whether a discharge or other discipline is supported by "cause" usually puts the employee's alleged fault at issue. It does not seem to fit correctly where the issue is not the employee's fault, but his alleged inability to perform the work. Thus, arbitrators familiar with the seven tests for just cause[11] have tortured fact situations into Procrustean beds. For example, one arbitrator framed the issue of reasonable accommodation as whether the employer had made an "adequate investigation" of the grievant's prognosis.[12] Another arbitrator faced with a

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just cause issue questioned whether the employer gave the injured worker adequate notice that failure to return to work could result in discharge.[13]

An employer is better served — and the issue more squarely faced — when the questions for the arbitrator to answer are phrased in terms of the ability of the employee to perform the essential duties of the job and the obligation, if any, of the employer to accommodate the employee's disability. Accordingly, in disability cases, an employer may, if possible, want to consider action other than discharge or removal from the seniority list, such as placement on leave, either voluntary or involuntary, especially where the disability is other than permanent.

Regardless of the advice contained in this article, an employer may not be able to avoid the just cause standard easily. For example, in *Calmat Co.*,[14] the grievance challenged the employer's act of placing the grievant on an involuntary leave of absence. The grievant suffered from skin cancer that was job-related. The employer framed the issue as whether certain specified contract provisions, that did not include the just cause provision, had been violated.[15] The union countered with the usual "just cause" formulation.[16] The arbitrator framed the issue as whether the contract as a whole had been violated, but the only contract provision that he cited as relevant was the "good cause" for discharge section.[17] The arbitrator characterized the placing of the grievant on an involuntary medical leave as "akin to discharge,"[18] thereby triggering the good cause standard. It is not clear what effect the job-relatedness of the grievant's condition played in the award. Under the "good cause" standard, the arbitrator held that the employer had a duty to make such reasonable accommodations to the grievant's condition as sun blocks and appropriate headgear.

Not all arbitrators define disability issues in just cause language. *Jefferson Smurfit Corp.*[19] also posed a conflict between the employer and union over formulating the issue. The grievance challenged the employer's refusal to return the grievant to work following an on-the-job injury. The union characterized the issue as whether the grievant was discharged for just cause. The arbitrator, however, framed the issue as, "Whether the Company violated the collective bargaining agreement when it refused to permit the grievant to return to work after suffering a job-related injury."[20] As discussed below, the arbitrator deferred to the employer's doctor's judgment that the grievant could not return to her former position and found no contractual obligation to create a permanent light duty position for the grievant.

A frequent reason for discharge is alleged excessive absenteeism. But this ground for discharge was called into question by one arbitrator who opined that the term "excessive" has to be re-evaluated in light of the ADA.[21] Even before the ADA took effect, however, an arbitrator reversed the discharge for absenteeism of an employee disabled by an emotional illness.[22] While the employer had the right to deny permission for the absence due to hospitalization, the arbitrator had authority to review its result and set it aside. The employee's long and relatively unblemished work record may have been a factor in this case, which was decided on the question of "cause" for the termination. In *Dunlop Tire Corp.*[23] a discharge for excessive absenteeism was upheld where the employee had been absent for two years and was "industrially unemployable" due to back problems. Similarly, an arbitrator held that the grievant in *James River Corp.*[24] was properly discharged for failing to notify the employer at the end of his medical leave of his continued medical need for the absence.

In *Chicago Board of Education*,[25] a case decided by this author, the employer had the employee examined by its doctor for allegedly bizarre behavior. The doctor found that the employee had an emotional disability and placed the employee on involuntary leave. The arbitrator found no violation of the contract or policy in either the examination or the leave.[26] A violation did occur, however, as a result of the public employer's failure to accord the teacher a post-leave hearing to contest its validity pursuant to applicable state court decisions. Neither party raised the ADA's restrictions on medical examinations. Had the issue been raised, the examination presumably could have been successfully defended as "job-related and consistent with business necessity."[27] Fitness for duty — the ability to perform the essential job functions — should be a legitimate inquiry in assessing one already on the payroll.[28]

In *Apcoa, Inc.*,[29] the employer denied a medical leave. The grievance was sustained. Among other factors, the arbitrator found that the employer had violated the Family and Medical Leave Act by failing to give proper notice to the employee.

In several cases arbitrators reviewed employer refusals to reinstate employees from medical leave. These cases also involved conflicting doctor opinions. Generally, arbitrators have deferred to employer doctors and upheld the employer's position.

For example, in *Keebler Co.*,[30] the arbitrator found that the company acted properly in refusing reinstatement. All jobs required lifting above the shoulders and the employee had suffered a permanent rotator cuff tear on the job. An interesting wrinkle is that the arbitrator had selected a neutral doctor to resolve the conflicting medical opinions. To the same effect is *Jefferson Smurfit Co.*[31] In that case, the

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arbitrator preferred the opinion of the company doctor which had been substantially confirmed by an independent physician.[32] The arbitrator also opined that the collective bargaining agreement did not require the employer to create permanent, as opposed to temporary, light duty jobs.[33]

Loose Leaf Metals Co.[34] upheld the right of the employer to require a medical examination before an employee on medical leave could return to work. The arbitrator preferred the opinion of the company doctor because the employee's doctor had provided only a general release to resume work. The arbitrator used the Occupational Safety and Health Act as a shield for the company.[35] He found that reinstating the employee might jeopardize the employer's obligation to assure a safe workplace. He also took into account the fact that, after she was rejected, the grievant had applied for a permanent disability pension.[36] While the result reached may be correct, the last two propositions seem questionable. Reliance on OSHA was dubious because there was no indication that reinstatement would have presented a danger to anyone other than the grievant herself. The grievant's application for a disability pension was a natural reaction to being rejected as unemployable and should not have been considered an admission of permanent disability.

It is common for employees to challenge involuntary transfers and assignments. In the cases examined, arbitrators tended to defer to decisions made by employers and their doctors. For example, the die setter grievant in *Rheem Manufacturing Co.*,[37] who had four back injuries, was reassigned to a lower paying production job. The action violated neither the contract nor the ADA, in the arbitrator's opinion. The contract permitted assignment of "disqualified" employees to production work and continued work as a die setter involved substantial risk of reinjury. With respect to the reasonable accommodation requirements of the ADA, the arbitrator found that continuing the grievant as a die setter would have required the assignment of a second employee to perform essential functions of the job, an unreasonable accommodation.[38]

In *Charley Brothers Division, Super Valu Stores, Inc.*,[39] the employee had suffered frostbite while working at his job in the freezer. After a brief assignment to light duty, the employee again suffered frostbite and the company doctor predicted that he would become increasingly susceptible. Thus, further assignment to the freezer was unacceptable. The company reassigned him to a temporary position in the dry warehouse at no loss in pay and increased the staffing level by one. No affected employee grieved, but the union did, alleging a contract violation in forcing the employee off of a bid job. The arbitrator denied the grievance, citing the exercise of management's right to transfer for "just cause." The arbitrator further held that failing to post the job was appropriate in this "abnormal" situation.

In *Summit County (Ohio) Board of Mental Retardation*,[40] a special education teacher had been reassigned as a teacher assistant. Charges of unprofessional conduct could not be proved. The arbitrator accepted the Board's theory that the reassignment was not disciplinary but for the purpose of accommodating the teacher's alleged emotional unfitness. Therefore, the Board did not have to prove "just cause" for its action. The Board had offered a psychological examination at its expense to determine fitness for the teacher job. The arbitrator's remedy included a renewal of the offer and reinstatement if the teacher was found fit.

However, arbitrators will overrule involuntary transfers and assignments to the extent that such moves conflict with express provisions of the collective bargaining agreement. In *Commonwealth Edison Co.*,[41] a lineman had fallen while on the job, suffering substantial head injuries. Continued assignment as a lineman was out of the question. However, the employer violated the agreement by assigning him to a janitor position rather than delivery messenger or stockman, higher rated jobs than janitor. Since the injury was suffered on the job, the grievant was entitled to preferential treatment under the contract. In determining the medical cause of the employee's disability, the arbitrator discounted the general propositions that the burden is usually on the union to establish a job-related disability and that an employer is entitled to rely on its own doctor's opinion in the absence of arbitrary, capricious or discriminatory action.[42] Here the doctor's diagnosis at the hearing conflicted with his earlier determination that the fall caused the disability.

Accommodations

Under the ADA, "reasonable accommodation" *may* include making facilities accessible and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations. . ."[43] Of these accommodations, the most discussed in arbitration cases are reassignments, especially to light or alternate jobs.

Light duty is a form of reasonable accommodation to the employee's physical or psychological disability. Historically, light duty was used as an accommodation to a physician's restrictions, usually lifting restrictions, hence the term "light duty." In conjunction with the passage of the ADA, the understanding of "disabilities" and "reasonable accommodation" has expanded. Cases may be found in which alternate or "light" duty is discussed for a variety of illnesses and injuries.[44]

The collective bargaining agreement may call for light duty in specified circumstances, in which case the employee's compensation is usually covered in the agreement.[45] A light duty program

also may be unilaterally created by the employer in response to cost considerations, including workers' compensation for work-related injuries or illnesses.[46] Some contracts call for the parties to negotiate accommodations for disabled employees.[47]

It is generally held that an employer is not obligated to "create" a job to accommodate an employee's restrictions.[48] Arbitrators, however, frequently do not require the employee to be able to perform the full range of functions the job entails, but only its "essential functions."[49] These principles are generally applied in the same manner in public employment matters.[50]

In deciding whether an employer has the duty to make an accommodation or whether the employer has properly fulfilled that duty, various factors recur. They include: (a) whether an injury or illness is permanent or temporary, (b) whether it is job-related and (c) the effect of the requested remedy on other employees. Sometimes these factors are mentioned and relied on. Sometimes they are only in the background.

Where the disability is only temporary, arbitrators may be reluctant to remove the employee from the seniority list. When the injury or illness is permanent, there is a question of whether the employee will ever be employable, even with accommodation. Where the injury is compensable, arbitrators consider an employer's interest in finding work for the grievant rather than having the occurrence continue against its workers' compensation insurance experience record.[51] And arbitrators look at the legitimate interests of other potentially affected employees.

These factors came together in *Eastwood Printing Co.*[52] The grievant had been off work for one year and the employer discharged him. The injury was work related and resulted in a congenital defect of the wrist. The employer thought the condition permanent but did not consider the workers' compensation insurer's classification of the injury as temporary. Nor did the employer discover that the grievant had made some recovery and that a third surgical procedure had a hopeful prognosis. While ordering reinstatement, the arbitrator declared that it could not have the effect of displacing other workers.

In *Ladish Co.*,[53] the arbitrator refused to order an employee with a permanent disability reinstated to a light duty job where the reinstatement might have displaced other employees with temporary handicaps. On the other hand, the arbitrator in *Bertelson Brothers*[54] ordered reinstatement to light duty for an employee with chronic back problems. The employee's normal assignment had been light duty and there was no shortage of light duty jobs. In *Phelps Dodge Magnet Wire Co.*[55] the arbitrator found that the company violated the contract because it made no effort to place an ill employee in a temporary job.

In *Kerr Group, Inc.*,[56] the contract specifically protected the seniority of employees with compensable injuries. The arbitrator set aside the employees' discharges. He did not note with any particular emphasis that the employer had chosen March 1992, after the passage of the ADA but only four months before its effective date, to take this action.[57] In *Aratex Services, Inc.*,[58] the arbitrator held that leaves due to compensable injuries were not within the scope of the agreement provision limiting leaves of absence to twelve months. *Magnolia Marketing Co.*[59] takes the same position. Despite the compensable nature of the claim, the arbitrator in *Sealright Co.*,[60] allowed the discharge to stand. The grievant was likely to aggravate her carpal tunnel syndrome if she returned to work. No alternative jobs were discussed. The arbitrator in *Lear Corp.*[61] held that the contract provision protecting "restricted-duty" employees made no distinction between compensable and off-the-job injuries. Nonetheless, he found the employer had violated the contract by sending such employees home rather than rotating them into "appropriate" jobs as the agreement required.

The issue of whether an employee should be assigned to light duty usually involves such a request from the grievant — so that he may earn something while disabled. However, in *City of Washington (Ohio)*,[62] the employer tried to force the grievant into a light duty position. The contract provided for injury leave with pay and the arbitrator found that the City violated the contract by ordering an injured fire fighter to sacrifice that benefit by performing light work.

Where the contract specifically forbade discrimination on the basis of "handicap," an arbitrator inquired into the reasonableness of the employer's accommodation efforts in the context of a "just cause" case.[63] The arbitrator repeated the oft-cited proposition that accommodation does not require the creation of a job for the grievant.[64] Similarly, in *Sun Co.*,[65] the employee wanted her long term disability status and associated leave to continue. The employer's policy was to deny the benefit where there was no job to which the employee could return. The arbitrator found this to be the case, because any bargaining unit job involved substantial risk of re-injury for the foreseeable future.

Even when the ADA was not applicable, at least one arbitrator could not ignore it. In *Carleton College/Marriott Food Service*,[66] not only did the discharge occur more than a month before the ADA employment provisions took effect, the contract explicitly denied the arbitrator authority to interpret external law. Nonetheless, the arbitrator held that "[e]xternal law is relevant . . . as a yardstick to measure the reasonableness, intent and purpose of the [sexual] harassment policy. . ." under which the grievant was discharged. Moreover, after quoting *Alexander v. Gardner-Denver Co.*,[67] to the effect that "an arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties,"[68] the arbitrator continued to consider the effect of the yet-to-be-

effective ADA. He reasoned that a discriminatory discharge would not be for cause and he looked to the ADA to determine if the discharge was discriminatory.[69] The case involved an unwanted sexual approach on a fellow employee by an individual with below average intelligence employed in a menial capacity. Balancing the interests of the employer in maintaining a harassment-free workplace and the disability of the grievant, the arbitrator found the discharge was "without just cause" and ordered reinstatement, but with reduced backpay if the employer agreed to use a job coach with the grievant to train him in appropriate standards of workplace conduct.

In another pre-ADA award, the arbitrator in *Madison Area Vocational, Technical and Adult Education District,*[70] incorporated state law into the contract through the non-discrimination clause. He found that the District violated the collective bargaining agreement when it denied the request of a teacher with a degenerative spinal condition to be transferred to a more sedentary job. The employer was required to make a reasonable accommodation to the disability because the accommodation would not cause it to suffer undue hardship.

In *Flamingo Hilton-Laughlin,*[71] the arbitrator found that the ADA was incorporated into the collective bargaining agreement by virtue of a non-discrimination clause. Examining the statute and the regulations, the arbitrator concluded that the employer had made a reasonable accommodation by offering a dispatcher job to an employee with degenerative joint disease of the knee. When, after more than six months off the job the employee declined the offer, the employer's obligation had been fulfilled and the employer was free to remove the employee from its workforce. The arbitrator reached a similar result in *Reister & Thesmacher.*[72] In *Cleveland Electric Illuminating Co.*[73] the contract required the employer to place an "incapacitated" employee in "any work he can do."[74] The employer's obligation to conduct a job search was not confined to "existing or defined classification openings,"[75] according to the arbitrator, who also cited the ADA.

Drugs and Alcohol

The ADA specifically removes the protection of the Act from anyone who is "currently engaging in the illegal use of drugs," if the action is based on that *use*, rather than on the employee's condition.[76] That general statement is circumscribed with specific provisions protecting, for example, employees who are in or who have completed drug rehabilitation programs.[77] It also provides that a drug test is not considered a prohibited "medical examination,"[78] and specifically permits employers to comply with the requirements of the Department of Defense, Nuclear Regulatory Commission and the Department of Transportation.

A complete examination of the drug and alcohol policy of the United States as it affects the work force is worthy of a book.[79] It is outside the scope of this limited paper. A limited examination of several cases, however, discloses many of the usual questions.

In *Bruce Hardware Floors,*[80] a case decided on the usual "just cause" standard, the arbitrator held that an employee who had tested positive for a prescription drug was improperly discharged. He had a clean record for 26 years, had tested negative on other random drug tests and his story that he had accidentally ingested his wife's tranquilizer was plausible. An employee who was discharged when he failed a second drug test was reinstated upon successful completion of rehabilitation.[81] The employer had failed to maintain the contractually-required rehabilitation program. California law was applied in *Avnet, Inc.*[82] That law required that an employer reasonably accommodate an employee who wished to enroll in a drug rehabilitation program. However, when the employee was unable to show up for work sober and only asked for an opportunity to "dry out" under "supervised probation," the demand was not explicit enough that he wanted a program involving a leave of absence. The employee in *Vogel Disposal Co.*[83] pleaded to no avail that his discharge should not stand because, as a light-duty employee, his job was outside the bargaining unit.

Conclusion

This has been a practical attempt to understand how arbitrators decide various matters involving the disabilities of employees. The author hopes that it provides a starting point for practitioners and students in their research of the subject.

Notes

1. 42 U.S.C. § 12102(b) (1994).
2. *Id.* §§ 12111-12117.
3. *Id.* §12112.
4. *Id.* §12111(9).
5. *Id.* § 12111(10).
6. *Id.* § 12117.
7. *See, generally,* Jane M. Draper, Annotation, *Accommodation Requirement Under State Legislation Forbidding Job Discrimination on Account of Handicap,* 76 ALR4TH 310 (1990).
8. The Employment Subchapter of the Act became effective July 26, 1992, 24 months following its enactment. Pub. L. 101-336, §108. Some of the earlier cases examined here were decided after the effective date of the Act, but the facts arose before it became effective.
9. For a more comprehensive, theoretical and scholarly approach to the subject, see Jay E. Grenig, *Disabled Workers,* in LABOR AND EMPLOYMENT ARBITRATION ch.23 (Tim Bornstein, et. al. eds. 2d ed. Matthew Bender, 1998).
10. *See, e.g., West Virginia Power,* 100 LA 564 (Zobrak, 1992); *A.Y. McDonald Mfg. Co.,* 99 LA 118 (Loebach, 1992); *Eastwood Printing Co.,* 99 LA 957 (Winograd, 1992); *Dunlop Tire Corp.,* 92-2 ARB &8456 (Killingsworth, 1992).
11. *See Grief Bros. Cooperage Corp.,* 42 LA 555, 557-559 (Daugherty, 1964). For a complete discussion of the seven tests and "just cause" *see* DISCIPLINE AND DISCHARGE IN ARBITRATION, ch.2 (Norman Brand, & Patricia Thomas Bittle, eds. BNA Books, 1998).
12. *Eastwood Printing, supra* note 10 at 962.
13. *West Virginia Power, supra* note 10 at 564.
14. 93-2 ARB &3366 (Tamoush, 1993).
15. *Id.* at 4860.
16. *Id.* at 4861.
17. *Id.*
18. *Id.* at 4862.
19. 93-1 ARB ¶3176 (Moore, 1993).

20. *Id.* at 3950.
21. *Thrifty Cos.*, 103 LA 317, 320 (Staudohar, 1994).
22. *Dunlop Tire Corp.*, *supra* note 10.
23. 107 LA 483 (Heekin, 1996).
24. 107 LA 638 (Borland, 1996).
25. 108 LA 1193, 98-2 ARB &5199 (Rubin, 1997).
26. *Cf. Reckitt & Colman, Inc.*, 108 LA 726 (Thornell, 1997) (employer did not violate contract when it placed employee on medical leave after clinical psychologist diagnosed emotional disability).
27. 42 U.S.C. §12112(d)(4)(A).
28. Pre-employment inquiries into an employee's disability are circumscribed by the ADA, but rarely get arbitrated.
29. 107 LA 705 (Daniel, 1996).
30. 93-2 ARB ¶3444 (Beckjord, 1993).
31. *Supra* note 19.
32. *Id.* at 3953.
33. *Id.*
34. 92-2 ARB ¶8593 (Fowler, 1992).
35. *Id.* at 5754.
36. *Id.* at 5755.
37. 108 LA 193 (Woolf, 1997).
38. *Id.* at 196.
39. 99 LA 404 (Duff, 1992).
40. 100 LA 4 (Dworkin, 1992).
41. 93-1 ARB ¶3135 (Heinsz, 1992).
42. *Id.* at 3751.
43. 42 U.S.C. § 12111(9).
44. *Minnegasco, Inc.*, 103 LA 43 (Bognanno, 1994)(lifting restrictions during pregnancy); *Dinagraphics, Inc.*, 102 LA 947 (Paolucci, 1994) (gout); *LS-II Electro Galvanizing, Inc.*, 98 LA 565 (Bethel, 1991) (epilepsy); *City of Brook Park (Ohio)*, 98 LA 758 (Nelson, 1992)(allergy to latex gloves/powder); *Memphis Light, Gas & Water Division*, 98 LA 1123 (Goldman, 1992) (emotional stress); *Aircraft Braking Sys. Corp.*, 97 LA 50 (Strasshofer, 1991)(carpal tunnel syndrome); *Potlatch Corp.*, 97 LA 1001 (Allen, 1991)(impaired vision); *Transit Authority of River City*, 95 LA 137 (Dworkin, 1990)(alcoholism).
45. *Zinc Corp. of America*, 101 LA 643 (Nicholas, 1993)(bumping rights for any employee with illness or injury); *Waterous Co.*, 100 LA 278, 280 (Reynolds, 1993)(no reduction in pay for 6 months); *LS-II Electro Galvanizing, Inc., supra*, note 44 at 571 ("every reasonable effort [to find] alternate work"); *International Paper Co., Mobile Mill*, 94 LA 409, 410 (Mathews, 1990)(agreement provided that employer "shall place" a disabled employee on a job he is capable of performing and to which he is entitled by seniority).
46. *American Crystal Sugar Co.*, 99 LA 699 (Jacobowski, 1992)(employer's right to change return to work policy in absence of collective bargaining agreement restriction or binding practice); *Stanford Div., Man Roland Inc.*, 97 LA 175, 177 (Speroff, 1991)(employee placed in janitorial position to avoid continued lost time & increase in workers' compensation rates); *Waterloo Indus.*, 96 LA 41 (Yarowsky, 1990)(employee had right to light duty work); *Spartan Stores, Inc.*, 93 LA 557 (Kanner, 1989)(employer had right to create "favored work program" for job injuries).
47. *Waterous Co., supra* note 45 at 279.
48. *Ogden Allied Plant Maintenance Co. of Okla.*, 101 LA 467, 468 (Harr, 1993); *Mallinckrodt, Inc.*, 95 LA 966 (Hilgert, 1990);*City of Ithaca [NY]*, 94 LA 747 (Miller, 1990).
49. *Army Aviation Sys. Command*, 100 LA 631, 635 (O'Grady, 1993). This requirement is consistent with the ADA. *See* 42 U.S.C. §12111(8), which defines a qualified individual as one who can perform the "essential functions" of the job and §12111(9) which defines reasonable accommodation to include only "reassignment to a vacant position."
50. *See, e.g., Metropolitan Atlanta Rapid Transit Auth.*, 102 LA 1091 (Terrill, 1994)(reliance on contract only); *Army Aviation Ssys. Command, supra*, note 49 at 636 (FECA considerations); *City of Brook Park (Ohio)*, 98 LA 758 (Nelson, 1992)(relying in part on Ohio law requiring reasonable accommodation); *Las Vegas Water District*, 96 LA 513 (Draznin, 1991); *City of Ithaca (NY), supra* note 48.
51. *See, e.g,, Dunlop Tire Corp.*, 107 LA 97 (Kindig, 1996)(contract gave employer discretion to assign light duty; reasonable for employer to prefer occupationally injured or ill employees); *Grey Eagle Distributors, Inc.*, 107 LA 673 (Pratte, 1996)(employer did not violate the contract by laying off employees, even while allowing injured employee to perform light duty work).
52. *Supra* note 10 at 957-58.
53. 93-2 ARB &3379 (Redel, 1993).
54. 92-2 ARB &8505 (Jacobowski, 1992).
55. 108 LA 21 (Curry, 1996).
56. 93-1 ARB &3114 (Shearer, 1992).
57. To the same effect is *Amperipol Syntol Corp.*, 107 LA 508 (Caraway, 1996).
58. 93-1 ARB &3187 (Gordon, 1992).
59. 107 LA 102 (Chumley, 1996).
60. 92-2 ARB &8457 (Thornell, 1992).
61. 108 LA 592 (Goldberg, 1997).
62. 108 LA 892 (Wren, 1997).
63. *Ladish Co., Inc., supra* note 53.
64. *Id.* at 4938.
65. 92-2 ARB &8537 (Daniel, 1992).
66. 93-1 ARB &3104 (Bard, 1993).
67. 415 U.S. 36 (1974).
68. 93-1 ARB at 3563.
69. *Id.*
70. 93-1 ARB &3128 (Johnson, 1992).
71. 108 LA 545,554 (Weckstein, 1997). The contract also included specific reference to the ADA.
72. 107 LA 572 (Weisheit, 1996).
73. 100 LA 1039 (Lipson, 1993).
74. *Id.* at 1043.
75. *Id.* at 1045.
76. 42 U.S.C. § 12114 (a).
77. 42 U.S.C. § 12114(b).
78. 42 U.S.C. § 12114(d).
79. *See, e.g.*, TIA DENENBERG & RICHARD DENENBERG, ALCOHOL AND OTHER DRUGS ISSUES IN ARBITRATION (BNA Books, 1991).
80. 108 LA 115 (Allen, 1997).
81. *Bayer Corp.*, 108 LA 316 (Zobrak, 1997).
82. 107 LA 921 (Kadue, 1996).
83. 108 LA 1121 (Hewitt, 1997).

RECENT DEVELOPMENTS

by the Student Editorial Board

Recent Developments is a regular feature of *The Illinois Public Employee Relations* Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes. The equal employment opportunity laws and the First Amendment.

IELRA Developments

Supervisors

In *Illinois State University and AFSCME, Council 31, Local 3236,* No. 99-UC-0004-S (IELRB 1999), the IELRB clarified the clerical and technical employees bargaining unit to include the Chief Clerk, who was formerly excluded as a supervisor. Illinois State University ("ISU") is an educational employer within the meaning of Section 2(a) of the Act. Due to changes in the duties and responsibilities of the Chief Clerk, the parties had filed a Joint Stipulation for Unit Clarification.

The Chief Clerk's work responsibilities included the hiring and training of eighteen part-time student-workers and directing and approving their work. She also recommended pay increases for these student workers. She spent about 35 percent of her work time supervising these student workers. She spent the remainder of her work time performing duties similar to other employees within the bargaining unit in question. The Chief Clerk also received the same vacation benefits, the same paid holidays and the same health insurance as the other employees in the bargaining unit.

The IELRB found that the Chief Clerk's responsibilities demonstrated

that she was an educational employee, rather than a supervisor. Section 2(b) defines an educational employee as, "any individual, excluding supervisors, managerial, confidential, short term employees, student and part-time academic employees of community colleges employed full or part time by an educational employer . . ."

The IELRB found that it was clear that the Chief Clerk was no longer a supervisor for two reasons. First, because the Chief Clerk only spent 35 percent of her time conducting work that could be considered supervisory, she no longer satisfied the definition of supervisor in Section 2(g) of the Act. Section 2(g) states, *inter alia*, that "[t]he term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority." Since 35 percent was not a "preponderance" of her employment time, she could not be considered a supervisory employee.

Second, the Board explained that because the Chief Clerk's supervisory authority was exercised over student workers, who were not educational employees and who were not members of the bargaining, the Chief Clerk was not performing work indicative of a § 2(g) supervisor. The Board explained that Section 2(g) plainly states that the supervisory authority must be exercised over "employees within the appropriate bargaining unit." Since the student workers were not members of the bargaining unit, the Chief Clerk's supervision of them was not indicative of a supervisor within the meaning of Section 2(g) of the Act. Therefore, even if her supervisory responsibilities consumed 55 percent of her work time, she would not be considered a § 2(g) supervisor.

IPLRA Developments

Duty to Bargain

In *AFSCME and County of Williamson*, Case No. S-CA-97-90 (ISLRB 1999), the State Board held that the County of Williamson violated Sections 10(a)(4) and (1) of the IPLRA when it unilaterally terminated the grievance arbitration procedure and refused to bargain with the union over the grievance procedure.

AFSCME represented a unit of Williamson County correctional officers, bailiffs, court security officers, jail cooks, and clerks. The parties' 1993-96 collective bargaining agreement contained a grievance procedure that culminated in arbitration. After several months of fruitless negotiations on a successor contract, the Sheriff of Williamson County announced that disputes over discipline and discharge would no longer be processed through the grievance procedure, but instead would be resolved exclusively by the Williamson County Sheriff's Merit Commission, which the County created pursuant to the Sheriff's Merit System Law, 55 ILCS 5/3-8001 *et. seq.* In response to this announcement, AFSCME filed an unfair labor practice charge.

Section 7 of the IPLRA provides, in part, that "[t]he duty to 'bargain collectively' shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law. . ." Williamson County argued that discipline and discharge procedures fell outside the scope of mandatory bargaining under Section 7 because those subjects were "specifically provided for" in other laws; namely, the Sheriff's Merit System Law.

The State Board rejected the County's argument for several reasons. First, the County's preemption argument was inconsistent with the General Assembly's intention, in enacting collective bargaining laws, to guarantee public employees the right to negotiate with respect to wages, hours and conditions of employment, through designated representatives of their own choosing. Second, citing *AFSCME v. Cook County*, 145 Ill.2d 475 (1991) and *City of Decatur v. AFSCME*, 122 Ill.2d 353 (1988), the ISLRB explained that the Illinois Supreme Court had already rejected the argument that the duty to bargain does not extend to terms and conditions of employment covered by a local civil service system. Moreover, the court had also held that where the provisions of a civil service statute are optional upon the public employer involved, the employer cannot rely upon them as preempting the duty to bargain. Significantly, the County was not required to apply the Sheriff's Merit System Law to the correctional officers and other unit employees. Thus, because the Sheriff's Merit System Law was optional on the County, the ISLRB concluded that the County could not rely upon the Law as preempting the duty to bargain.

The County attempted to distinguish *Cook County* and *City of Decatur* on the grounds that, unlike Cook County and Decatur, Williamson County is not a home rule unit of local government and therefore is bound by the Merit System Law. The ISLRB rejected this contention. After noting that County's non-home rule status was immaterial to the analysis, the Board simply reiterated its conclusion that the two cases established that the County could not rely on the Merit System Law to evade its statutory bargaining obligation.

Interest Arbitration

In *International Association of Firefighters, Local 413 and City of Rockford*, Case No. S-CA-97-125 (ISLRB 1998), the State Board held that the City of Rockford violated Sections 10(a)(4) and (1) of the IPLRA when it refused to proceed to interest

arbitration to resolve collective bargaining disputes involving telecommunicators included in the bargaining unit represented by the Union.

The Union represented a unit of Rockford city employees in the titles of Fire Captain, Fire Lieutenant, Fire Equipment Specialist, Driver-Engineer, Inspector, Mechanic and Telecommunicator. The Telecommunicators were civilian employees who did not meet the statutory definition of "firefighter." When the Union and the City reached an impasse during their 1996 contract negotiations, the Union filed a demand for interest arbitration. The City agreed to proceed to interest arbitration, but refused to engage in interest arbitration for the Telecommunicators. The City contended that because the Telecommunicators were not "firefighters" under the Act, they had the right to strike, and the City was not obligated to engage in interest arbitration with the Telecommunicators. The ISLRB framed the issue before it as: whether the City violated Sections 10(a)(4) and (1) of the Act by refusing to participate in interest arbitration for Telecommunicators who are part of a historical bargaining unit which predominantly includes employees who are firefighters within the meaning of the Act and prohibited from striking.

The ISLRB began its analysis of the case by noting that by enacting the IPLRA, the General Assembly "endeavored to prescribe a system of collective bargaining under which individuals who are included in an appropriate bargaining unit may achieve the benefits of their collective strength and bargaining power in seeking to secure wages, hours and working conditions. . ." As to the City's argument that the Telecommunicators possessed a statutory right to strike and therefore had an effective method of dispute resolution at their disposal, the ISLRB explained that "given the composition of the instant bargaining unit, use of strike as a means of resolving negotiations (sic) impasses with the City is neither a viable nor effectual dispute resolution mechanism, as it can never represent the collective strength of the unit employees." Thus, to prevent labor strife and ensure consistent contract terms within a single bargaining unit, the ISLRB held that the City violated Sections 10(a)(4) and (1) when it refused to engage in interest arbitration with the Telecommunicators. Interestingly, the State Board noted, in dicta, that because a majority of the unit were prohibited from striking and were instead required to proceed to interest arbitration, the telecommunicators must resolve their labor disputes through interest arbitration and may not strike.

Weingarten Rights

In *Teamsters, Local 714 and City of Highland Park*, Case Nos. S-CA-97-141, S- CA-97-147 (ISLRB 1999), the State Board held that a make whole remedy was appropriate where an employer issued a three day suspension in retaliation for an employee's asserting a statutory right to union representation, i.e., a *Weingarten* right. This was a matter of first impression for the State Board. The parties argued the case based on the Local Board's standards set out in *City of Chicago (Department of Aviation)*, 13 PERI ¶3014 (ILLRB 1997). The State Board reviewed the case under the *Department of Aviation* standards, but reserved ruling on the appropriate relief for a *Weingarten* violation. Nevertheless, its ruling is insightful as to what standards are considered in the remedial scheme.

In *Department of Aviation*, the Local Board set out two scenarios in which it would grant make-whole relief for *Weingarten* rights violations: (1) where the employer took the adverse action to punish the employee for asserting his statutory right to union representation; or (2) where the employer's decision to discharge or discipline was "predominantly dependent upon" information obtained from the unlawful interview. If the employer would have imposed the discipline regardless of the *Weingarten* violation, the Local Board stated, it would impose a cease and desist order but sustain the discipline.

The case before the ISLRB involved a police officer who purportedly violated the police department's grooming standards and dress code. The officer was scheduled to testify in front of a grand jury following two days off duty. The officer stopped by the station prior to going to court. A supervisor was told the officer was in civilian dress and had a beard of three days growth, in violation of department policy requiring officers to be clean shaven and in uniform for court appearances.When the officer returned to the station he was told to shave and return to the grand jury proceedings in uniform and that he and the supervisor would talk about the infraction later. Upon returning after court proceedings later that afternoon, the supervisor was unavailable and the officer phoned him at home. A meeting was arranged for the following morning. Anticipating discipline, the officer contacted the union to request assistance at the meeting.

The next morning when the union steward arrived, the supervisor disavowed the existence of the union, stated the steward's presence had "changed everything," cancelled the meeting and told the officer he would "deal with him later." The supervisor checked established guidelines and decided that union representation was permitted only for "formal" investigations of a serious nature.

The following day, the officer was summoned to meet with two supervisors, at which time the officer repeated his request for union representation at least twice. The questioning about the dress and grooming violations was quite abrasive and the officer was rebuked harshly. Inquiries by the officer as to the status of the investigation met with vague responses from one supervisor who commented that the union representation request had "really stirred up the pot." The officer was later given a three day suspension. The State Board found there to be a *Weingarten* violation and allowed the officer make-whole relief.

The ISLRB found that the evidence established that the employer's hostility to the officer's request for union representation was a substantial factor in the three day suspension. The burden then shifted to the City to prove that the suspension would have resulted notwithstanding the *Weingarten* rights assertion by the officer. This burden could not be met simply by showing that a legitimate reason may have existed for the adverse action. Instead, the City had to show that its legitimate reason, standing alone, would have induced it to take the specific adverse action. In this case, the evidence showed, at most, that the officer might have received some sort of discipline for the grooming and dress code violations. The crucial question was whether the officer would have received a three day suspension, in lieu of some lesser penalty, had he not asserted his rights to representation.

Although the City presented evidence of prior disciplinary incidents, the State Board found it significant that the City offered almost no evidence of the surrounding circumstances, including factors such as the specific nature and seriousness of the offenses involved, the past work and disciplinary records of the employees, their length of employment, and their prior knowledge of the work rules involved. Under the evidence provided by the City, the ISLRB found if difficult, if not impossible, to discern what types of misbehavior warranted certain discipline. On the inadequate evidence provided, and in light of the officer's relatively clean record, the Board could not find that the violations warranted a three day suspension.

The City contended that the information regarding the violations was not revealed in the meetings wherein union representation was denied. The violations were known to the supervisors prior to any meetings. The Board agreed and found that the City was not "predominantly dependent upon" information gained in an unlawful disciplinary interview in subjecting the officer to discipline. The imposition of a make-whole remedy, however, was justified because the suspension retaliated against the officer's assertion of *Weingarten* rights.

EEO Developments

ADEA-Soverign Immunity

In *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998), the Second Circuit Court of Appeals held that the Eleventh Amendment does not deprive the district courts of subject matter jurisdiction to hear Age Discrimination in Employment Act (ADEA) claims brought by individuals against state agencies or officials. The appeal arose out of three separate lawsuits filed in federal district court by individual plaintiffs against New York and Connecticut state agencies in the early 1990's. All of the plaintiffs alleged that their employers violated the ADEA. Each defendant moved to dismiss or moved for summary judgment on the ground that the Eleventh Amendment deprived the district courts of jurisdiction over ADEA claims filed by individuals against the States and state agencies. The defendants' motions were all denied by the district court judges hearing them. Each of the three defendants appealed. The Second Circuit ordered the appeals to be heard in tandem.

The court observed that the Eleventh Amendment has been interpreted as barring suits in federal court against unconsenting States by citizens of other States as well as its own citizens. However, the court explained that Congress may abrogate the States' sovereign immunity if it (1) provides "a clear legislative statement" of its intent to abrogate, and (2) legislates pursuant to a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment.

When Congress passed the ADEA in 1968, it only applied to private employers. Congress amended the ADEA in 1974 by adding states and their agencies to the definition of "employer" and by adding "employees subject to the civil service laws of a state government" to the definition of "employee." Congress, however, did not, amend the enforcement section of the ADEA. Thus, the enforcement clause continued to read, "any person aggrieved may bring a civil action in any court of competent jurisdiction. . .". The state agencies argued that, by not altering the enforcement clause, Congress failed to express an unequivocal intent to abrogate the States' immunity from suit in federal court. The Second Circuit concluded, however, that the combination of the amendments to "employer" and "employee" and the availability of private damage actions made it clear that Congress intended to subject states to liability under the ADEA. Thus, despite the fact that states were not named in the enforcement section, the court determined that Congress was "unmistakably clear" in expressing its intent to abrogate state sovereign immunity.

The state agencies also argued that Congress did not have the power to abrogate state sovereign immunity because the ADEA was not enacted pursuant to Section 5 of the Fourteenth Amendment. To support this claim, the appellants pointed out that the ADEA does not contain any reference to Section 5 of the Fourteenth Amendment in the body of the statute or its legislative history. The court rejected this argument, noting that as long as Congress could have enacted the ADEA pursuant to Section 5, Congress need not formally declare its source of power. The appellants also argued that even if Congress intended to act pursuant to Section 5, it lacked the power to do so because the statute involves neither a fundamental right nor a suspect classification. The court rejected this argument too, explaining that Congress has the power to prohibit arbitrary age-based discrimination even though age is not a suspect classi-

fication and no fundamental right is involved. Thus, unpersuaded by the appellants' arguments, the Second Circuit held that the Eleventh Amendment does not deprive the district courts of subject matter jurisdiction to hear ADEA claims brought by individuals against state agencies or officials.

First Amendment Developments

In *Lewis v. Cowen*, 1999 WL 16405 (2d Cir. Jan. 15, 1999), the Second Circuit Court of Appeals addressed whether a public employer's decision to terminate an employee for refusing to speak violated the employee's First Amendment rights. This case presented the court with a slight variation from the more common First Amendment cases concerning an employee's right to speak out about a particular matter.

In May 1980, Lewis was appointed Chief of the Lottery Unit of the Connecticut Division (Division) by the Division's Executive Director and the Gaming Policy Board (Board). Lewis was responsible for designing lottery games and maintaining the security and public confidence in the lottery, as well as assuming the role as lottery spokesman with the media and public. In 1988, the Board awarded General Instrument Corporation (GIC) a contract to install an on-line computer system for the sale of lottery tickets. Lewis criticized GIC to the press when its system malfunctioned, resulting in the failure to generate on-line sales. In December 1988, Lewis shared with the Board his opposition to GIC's proposed change of requiring winners to choose 6 of 44 numbers rather than 6 of 40 numbers. He felt revenues would decrease if this change were implemented. Despite his concerns, the Executive Director of the Division (Hickey) directed Lewis to serve as project manager for this proposed change and told him to present the change to the Board in a positive manner. Lewis interpreted this directive as an order to lie to the Board, since Hickey had knowledge of Lewis' opposition to the change. Consequently, Lewis was concerned that the public would be unaware of his true opinion, as the Board meetings were open to the public. Because Lewis refused to attend the Board meeting and express his views in a positive matter, the Board terminated his employment.

Lewis filed a complaint in the district court alleging, among other counts, that the termination of his employment violated his First and Fourteenth Amendments rights under the United States Constitution. The jury decided that Hickey violated Lewis's First Amendment rights and returned a verdict for Lewis accordingly. On appeal, the defendants argued that Lewis' refusal to obey Hickey's order was not protected by the First Amendment.

The Second Circuit was guided by the Supreme Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995). In its decision, the Supreme Court established that in order to determine whether employee speech is protected by the First Amendment, courts must first decide whether the speech addresses a matter of public concern. The Second Circuit applied the guidelines set forth in *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), encouraging courts to look at the content, form, and context of a given statement to make this determination. More specifically, courts should analyze the motive of the speaker to determine whether the speech was made to redress personal grievances or whether it had a broader public purpose. The Second Circuit affirmed the district court's finding that Lewis' speech addressed a matter of public concern. The Court reasoned that Lewis' speech was motivated by a desire to maintain the Lottery games' viability and enhance public revenue, which is a matter of public concern.

After determining that Lewis' speech addressed a matter of public concern, the Second Circuit adopted the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1963) to determine whether the Division violated the First Amendment by firing Lewis for refusing to engage in communication with the Board. The *Pickering* Court described the test as requiring a balance between the interests of the employee in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Moreover, the court balances the interest of the employer in providing "effective and efficient" public service against the employee's First Amendment right to free expression and considers whether the protected statement interferes with the regular operation of the business. The manner, time, and place in which the speech occurs is important in determining whether it is protected. The *Pickering* balance is more likely to favor the government when an employee directly confronts his supervisor with objectionable language than when an employee engages in this type of speech on his own time in the absence of co-workers. The Second Circuit reasoned that the manner, time and place of Lewis's refusal to speak weighed heavily on the defendant's side. Lewis refused a direct order from his supervisor and the communications between Hickey and Lewis took place at the Division's offices during the workday.

The Second Circuit also recognized that the *Pickering* balance test is affected by the nature of the employee's responsibilities. The court was guided by *Rankin v. McPherson*, 483 U.S. 378, 390-91 (1987), in which the Supreme Court established that the policymaking status of the discharged employee is important in the balancing test. The *Connick* Court also explained that regardless of the content of the speech, responsibilities of the employees, or the

context in which the speech was made, the employer is not required to allow events to unfold that disrupt the office or destroy working relationships before taking action. Moreover, the state need only show a "likely interference with its operations." The Second Circuit concluded that the defendants' interest in the effective and efficient operation of the Division outweighed Lewis's First Amendment interest in refusing to present the proposed Lottery change in a positive manner. The defendants presented evidence that Lewis's refusal to promote the proposed change would result in negative publicity and decreased morale, and ultimately impair the profitability of the lottery.

Additionally, the Court reasoned that the nature of Lewis' responsibilities within the agency favored the defendants' position. Lewis was a senior policymaking employee, whose job required confidentiality and public contact. The Board paid Lewis a salary to contribute to the employer's effective operation; consequently, Lewis' refusal to communicate a positive image to the Board detracted from the agency's operations, which were dependant on the proposed change being implemented. Thus, the Second Circuit reversed the district court's decision and held that the defendants did not violate Lewis's First Amendment rights by terminating him based on Hickey's reasonable belief that Lewis's refusal to present the change to the Board in a positive manner might impair Division operations. ◆

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The author examined 79 arbitration awards covering the period 1981-1997 concerning discipline of police officers in order to determine the kind of conduct for which they were disciplined, the nature of offenses considered to be within the concept of "conduct unbecoming", and how arbitrators have decided these conduct cases. He found that over half of the cases concerned unbecoming conduct but the definition of such conduct included a wide variety of job behavior. Arbitrators do not adjudicate conduct unbecoming cases any differently from other types of discipline cases.

Eisenhart, Kathryn E. THE FIRST AMENDMENT AND THE PUBLIC SECTOR EMPLOYEE: THE EFFECT OF RECENT PATRONAGE CASES ON PUBLIC SECTOR PERSONNEL DECISIONS. Review of Public Personnel Administration, vol. 18, no. 3, Summer 1998, pp. 58-69.

This article analyzes the content and the impact of two U.S. Supreme Court cases involving the free speech rights of independent contractors and contractual employees. In the first case, *Board of County Commissioners v. Umbehr* (1996), the Court extended the right of free speech to independent contractors

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who had their contracts cancelled for criticizing the government. The second case, *O'Hare Truck Service, Inc. v. City of Northlake* (1996), involved a mayor's retaliation because an independent contractor failed to support him for reelection and publicly supported the mayor's opponent. The analysis is set in the context of the history of patronage in Illinois and the relationship to previous patronage decisions.

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This study compares total teacher compensation in school districts in the Chicago metropolitan area and downstate Illinois on the basis of characteristics of the school district and whether it is unionized or not, ability to pay, and the composition of the district's tax base in order to determine whether unionization or regional variables explain variations in teacher compensation. The analysis suggests that unionization has little effect on compensation, probably because Illinois school districts are heavily unionized. It also suggests that large proportions of agricultural property in the tax base depressed compensation as did receipt of large proportions of General State Aid.

Turpin, Richard A. AN ANALYSIS OF PUBLIC SECTOR INTEREST ARBITRATORS' ASSESSMENTS OF WAGE COMPARABILITY. Journal of Collective Negotiations in the Public Sector, vol. 27, no. 1, 1998, pp. 45-51.

One of the criteria almost always used in formulating public sector interest arbitration awards is wage comparability, but how do arbitrators decide which groups are comparable? The author examined 318 New Jersey police interest arbitration awards to see how arbitrators identified comparable employee groups. Of the arbitrators who stated what factors they considered, the most common factor was other municipalities in the same county ; second was nearby municipalities, and third was other public employees in the same municipality, frequently firefighters.

(Books and articles annotated in Further References are available on interlibrary loan through ILLINET by contacting your local library or system headquarters.)

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